IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 128 of 1982

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

SOCIETE COMMERCIAL COREALES AND FINANCIAL

Versus

THE STATE TRADING CORP.OF INDIA

Appearance:

1. Appeal from Order No. 128 of 1982

MR S.N. Shelat with Mr. KAMAL M MEHTA for Appellant

MR PM RAVAL for Respondent No. 1

MR SR SHAH for Respondent No. 2

CORAM : MR.JUSTICE M.S.SHAH

Date of decision: 09/09/97

ORAL JUDGEMENT

This appeal is directed against the order dated December 4, 1981 passed by the learned Civil Judge (S.D.)., Bhuj, below application Ex.10 in Special Civil Suit No. 36 of 1979 rejecting the prayer of defendant No.1 to stay the suit under the provisions of Section 3 of the Foreign Awards (Recognition and Enforcement) Act, 1961 (hereinafter referred to as 'Foreign Awards Act').

2. Respondent No.1 (hereinafter called 'the plaintiff') filed the present civil suit for recovering damages for a sum of Rs.5,17,232/- contending that the plaintiff had purchased 20,000 M. Tons of Soyabean Oil from defendant No.1 (the appellant herein) and that the said cargo was shipped by defendant No.1 through Vessel

'M. T. Split' belonging to defendant No.2. The said shipment was made pursuant to the contract dated August 17, 1977 between the plaintiff and defendant No.1. The cargo arrived at Kandla on February 27, 1978 but the total quantity of cargo actually discharged, according to the plaintiff, came only to 19877.376 M. Tons. According to Survey record, natural loss would come to about 24.841 M. Tons. Therefore, the plaintiff claimed damages for the net shortage of 97.783 M. Tons of Soyabean oil. The amount of damages was quantified as mentioned above and the plaintiff filed the present suit against the defendants in the Court of learned Civil Judge (S.D.)., Kutch at Bhuj.

3. Defendant No.1 (the appellant herein) submitted application Ex.10 under Section 3 of the Foreign Awards Act, relying on clause 25 (i.e., the Arbitration clause) in the contract entered into between the parties and prayed for stay of the suit proceedings.

Defendant No.2 also submitted an application for stay of the suit under Section 34 of the Arbitration Act and under Section 3 of the Foreign Awards Act pointing out that the Charter Party entered into between the parties provide for resolution of disputes through arbitration and the plaintiff itself had written a letter to M/s. J.M. Baxi & Co., Bombay dated 7th March stating that they had referred their claim for short delivery of 96.783 M. Tons of cargo in terms of charter party to arbitration at London and have nominated Mr. Ralph Lewzis Manager, Berisform Commodities Ltd., 50 Mark Lane, London EC 3 as their arbitrator. A photocopy of the said letter was also produced by defendant No.2 along with the application. Defendant No.2, therefore, submitted that since the plaintiff itself had taken recourse to arbitration proceedings, the Civil Court at Bhuj may not proceed with the present suit and the suit proceedings may be stayed.

4. The trial court rejected both the applications on the following grounds:

i) The arbitration clause in the contract would be applicable only if the oil is of non-USA origin but there is nothing on record to show that the suit cargo was of non USA Origin.

ii) Only the plaintiff and defendant No.1 were parties to the suit contract under which defendant No.1 had sold the suit cargo, but defendant No.2 was not a party to the contract and, therefore, the matter cannot

be split up for referring the matter to arbitration. For this purpose reliance was placed by the trial Court on decisions of the Andhra Pradesh, Calcutta and Nagpur High Courts.

5. The present appeal is directed against the aforesaid order of the trial court. While admitting the appeal in 1982 this court had granted ad-interim stay of the suit proceedings and the said stay has continued to operate since then.

6. At the hearing of the appeal, learned counsel for the appellant (defendant No.1), has made the following submissions to assail the order of the trial court:

i) The cargo in question, that is, Soyabean oil, was loaded at a port in Brazil and the appellant/defendant No.1 had made a specific averment in the application Ex.10 that the oil was of non-USA origin. There was no denial by the plaintiff of the aforesaid specific assertion made by defendant No.1 and, therefore, the trial court erred in observing that there is nothing on record to show that the suit cargo was of non USA origin.

ii) The contract between the plaintiff and defendant No.1 was the main contract on the basis of which the present suit was filed. The Charter party agreement was between defendant No.1 and defendant No.2 which would show that defendant No.2, the shipper, was agent of defendant No.1 and, therefore, it was open to both the defendants to apply for stay of proceedings under Section 3 of the Foreign Awards Act. Hence, there was no question of splitting up the claim as held by the trial court.

iii) The application submitted by defendant No.2 stated that the plaintiff itself had referred its claim to arbitration and, therefore, the trial court ought not to have rejected the application given by the defendants for staying the suit.

7. On the other hand, Mr. P.M. Raval, learned counsel for the respondent No.1 (original plaintiff) has submitted as under:

(i) Merely because the cargo was loaded at the ports of Brazil does not mean that the cargo was of non USA origin. It might be that the cargo might have been of USA origin and taken to Brazil and then loaded in to the vessel in question from the ports in Brazil. It is therefore submitted that there was no clear evidence to

show that the cargo was of non-USA origin.

(ii) The arbitration clause relied upon by the appellant (defendant no.1) was for the contract between the plaintiff and defendant no.1 to which defendant No.2 was not a party and therefore, the suit was not required to be stayed because the suit could go on against the defendant no.2 and such eventuality would amount to splitting up of claim and therefore, the trial court was justified in rejecting the application filed by respondent no.1 for stay of the proceedings.

As far as the claim against defendant No.2 is concerned, it is not against no.2 in its capacity as the alleged agent of defendant no.1 because there is nothing on record to show that defendant no.2 was agent of defendant no.1. Even if the charter party agreement was entered into by defendant no.1 and 2, defendant no.1 might have done so on behalf of the plaintiff.

(iii) The application filed by the appellant before the trial Court for stay of the proceedings also contained appellant's reply on merits of the dispute and therefore also, the suit proceedings are not required to be stayed.

(iv) In any view of the matter, the Court should exercise its discretion in not staying the suit proceedings because the suit claim is hardly for an amount of Rs.5,17,232/- with interest and that if the plaintiff-Corporation is driven to arbitration, which may take place at London, the costs which the plaintiff -Corporation would have to incur may even exceed the plaintiff's claim.

8. As far as the first contention raised by the learned counsel for the appellant is concerned, the trial court appears to have proceeded on the footing as if the assertion made by defendant No.1 that the oil was of non-USA origin was denied by the plaintiff. The question of leading any evidence by defendant No.1 in support of the aforesaid assertion would have arisen only if the plaintiff had denied such an assertion. Since the plaintiff had not controverted the specific assertion made by defendant No.1, the trial court should have proceeded on the footing that the cargo in question was of non USA origin especially in view of the fact that the cargo was admittedly loaded at a port in Brazil and not at any port in the USA. The first ground given by the trial court for rejecting the application, therefore, cannot be upheld.

9. The second ground which appealed to the trial court also does not appear to be well founded. It is true that in a suit based on one cause of action, if there are two defendants in the suit, the court cannot require the plaintiff to split up a part of the claim for referring the matter to arbitration in respect of one defendant and proceed with the other part of the suit against the other defendant. However. in the instant case, the question of spliting would not arise because admittedly the Charter Party agreement for shipping of the cargo was executed on 13.12.1977 between defendant No.1 and defendant No.2 for carrying the cargo of Soyabean oil from Brazil to India. It is thus clear that defendant No.2 was acting as an agent of defendant No.1 and, therefore, defendant No.2 had accepted the purchase price of the cargo in question on behalf of defendant No.1. Under these circumstances, a bare reading of Section 3 of the Foreign Awards Act clearly shows that not only the party to the arbitration agrement but also a party claiming through a party to the arbitration agreement would be entitled to invoke provisions of Section 3 of the Foreign awards Act. Section 3 of the Foreign Awards Act reads as under:

> "3. Notwithstanding anything contained in the Arbitration Act, 1940 or in the Code of Civil Procedure, 1908, if any party to an agreement to which Article II of the Convention setforth in the Schedule applies, or any person claiming through or under him commences any legal proceedings in any Court against any other party to the arbitration agreement or any person claiming through or under him in respect of any matter agreed to be referred to arbitration in such agrement, any party to such legal proceedings may, at any time after appearance and before filing a written statement or taking any other step in the proceedings, apply to the Court to stay the proceedings and the Court, unless satisfied that the agreement is null and void, inoperative or incapable of being performed or that there is not, in fact, any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings." (emphasis supplied).

In view of the above, it must be held that defendant No.2 was a party claiming through or under defendant No.1 in respect of the subject matter of the suit and also in respect of the subject matter of the dispute in question which is sought to be referred to arbitration and,

therefore, defendant No.2 was also entitled to apply to the Court to stay the suit proceedings. The second ground which appealed to the trial court must also, therefore, fail.

10. As regards Mr. Raval's contention that the application of defendant No.1 contained a reply on merits of the dispute, it is required to be noted all that the appellant had stated in the said application was that looking to the subject matter of controversy between the parties, the evidence of surveyors was decisive and the same was available at Brazil and therefore, the dispute should be resolved by arbitrators at London. Hence, the application in question cannot be said to contain any reply on merits of the dispute between the parties.

The plaintiff had also not raised any such contention before the trial court and the trial court has also not rejected the application on any such ground.

11. On he aforesaid question, the learned counsel for the appellant has further submitted that during pendency of this appeal, the provisions of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the New Act') have come into force with effect from January 25, 1996. Section 85 of the New Act provides for repeal of the Arbitration Act, 1940 and the Foreign Awards Act except in respect of arbitral proceedings which had already commenced. In the instant case, the arbitral proceedings had not commenced on the date of commencement of the New Act. Appeal is a continuation of the original proceedings. Moreover, the suit is still pending and, therefore, since the issue is not concluded till now, the provisions of the New Act would apply.

The learned counsel has, therefore, placed reliance on the provisions of Section 45 of the New Act which read as under:

> "45. Power of judicial authority to refer parties to arbitration.:- Not withstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

It is submitted on behalf of the appellant without prejudice to their contention that no reply was filed on merits, that filing of reply on merits does not disentitle the defendant from praying for stay of suit.

In my view there is great force and substance in the submission of the learned counsel for the appellant. In view of the language of the aforesaid provisions of Section 45 also, the proceedings of the present suit are required to be stayed as there is neither any pleading, much less any material on record, to show that the arbitration agrement is null and void, inoperative or incapable of being performed.

12. At this stage it is also required to be noted that language of Section 34 of the Arbitration Act, 1940 conferred discretion on the trial court to stay or not to stay suit proceedings but the language of Section 3 of the Foreign Awards Act was mandatory as held by the Supreme Court in the case of Renusagar Power Co. Ltd. v. General Electric Company, AIR 1985 SC 1156. In the said decision, the Supreme Court has observed as under:

> "Section 3 opens with a non obstante clause giving overriding effect to the provisions contained therein and making it prevail over anything to the contrary contained in the Arbitration Act, 1940 or the Code of Civil Procedure, 1908. Secondly, unlike S. 34 of the Arbitration Act which confers a discretion upon the Court, the section uses the mandatory expression "shall" and makes it obligatory upon the Court to pass the order staying the legal proceedings commenced by a party to the agreement if the conditions specified therein are fulfilled."

In application Ex.10, defendant No.1 had categorically made an averment that defendant No.1 is a company incorporated under the appropriate laws of Switzerland and the Government of India has, by notification published in the Official Gazette, declared that the Convention referred to in Sections 2 and 3 of the Foreign Awards Act applied to Switzerland. There is no dispute on this aspect of the matter even at the hearing of the appeal.

13. In view of the aforesaid discussion, there is no doubt that the disputes which are subject matter of the suit are covered by the arbitration clause and as per the

said arbitration agrement, the disputes are required to be referred to arbitration and the aforesaid mandatory statutory provisions must be given effect to.

14. It however, appears that the last submission urged by Mr. Raval is relevant. While the plaintiff may be required to prove its claim before the arbitrators, the question is whether the Court should impose any condition about the place of arbitration. Whether arbitration proceedings shall be held at Kandla where the cargo was delivered or at any other place. Mr. Shelat, for the appellant was, however, not very sure whether it would be open to this Court to impose such a condition.

At this stage, it should be noted that on account of pendency of this appeal of defendant No.1 and the interim stay granted by this court which has operated for the last 15 years, the plaintiff has been denied adjudication of his claim all these years. If this appeal were to be dismissed, the trial court at Kandla could have been directed to decide the suit within some stipulated time limit of a couple of months. The fundamental object of parties agreeing to arbitration and the Court compelling them to abide by such agreement is to save time as well as expenses of litigation. The plaintiff has already lost the advantage of time factor on account of the present appeal and interim stay for 15 years. It would, therefore, be quite unfair and unjust to require the plaintiff to incur heavy expenses of attending arbitration proceedings at London or in any other foreign country. As far as the defendants are concerned, they already have their agents at Kandla and have also engaged lawyer/s at Bhuj which is very close to Kandla and at Ahmedabad for this appeal. It is therefore directed that the arbitration proceedings shall take place at Kandla or Bhuj or Ahmedabad. If for, any reason, both the parties find it more convenient to have the arbitration proceedings at any other place in India, the parties may do so.

15. In the result the order of the trial Court is hereby set aside and the proceedings of Special Civil Suit No. 36 of 1979 are stayed pending the decision of the disputes by arbitration. The parties are directed to take appropriate steps for referring the disputes to arbitration which shall take place at Kandla or Bhuj or Ahmedabad. If for, any reason, both the parties find it more convenient to have the arbitration at any other place in India, they may do so.

16. The defendants in the suit shall within six weeks from today communicate to the plaintiff the name/s of the arbitrator/s to be appointed by the defendants. If the plaintiff agrees with the said request, the arbitrator so selected by the parties shall enter upon reference within two months from today and submit their awards within three months from the date of entering upon Reference.

If there is any difference between the parties, the plaintiff will be entitled to appoint its own arbitrator within one month from the date of receipt of the request from defendants and thereafter the arbitrators appointed by the parties shall enter upon reference within one month from the date of appointment of arbitrator by the plaintiff and submit their award within three months from the date of entering upon reference.

In case the defendants do not communicate to the plaintiff the name/s of the arbitrators to be appointed by them within the aforesaid time limit, stay granted hereinabove shall stand vacated and respondent No.1-plaintiff shall be entitled to proceed with the suit and the trial court shall decide the same in accordance with law.

17. The aforesaid directions are required to be given in view of the fact that the plaintiff's claim is pending since 1979.

18. The appeal is accordingly allowed in terms of the aforesaid directions with no order as to costs.
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